SOUTHERN FINANCE CO BHD

v.

ZAMRUD PROPERTIES SDN BHD (NO 3)

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[ORIGINATING SUMMONS NO: S2-24-67-1997]
19 NOVEMBER 1998

CIVIL PROCEDURE: *Costs - Getting-up fee - Judge reviewing registrar's decision - Whether and when interference proper - Whether registrar's justification for award erroneous - Whether defendant entitled to all the getting-up necessary for preparation of case - Whether only entitled in respect of points relied upon by court in arriving at decision - Whether value of plaintiff's claim relevant - Rules of the High Court 1980, O. 59 r. 36(1)*

The plaintiff's application for an order for sale had earlier been dismissed by the court and the senior assistant registrar ('the SAR') awarded the defendant RM10,000 for getting-up but subsequently reviewed and increased it to RM15,000. Still dissatisfied, the defendant filed the instant application under O. 59 r. 36(1) of the Rules of the High Court 1980 ('the RHC') for a review of the SAR's award.

Held:

[1] The SAR's justification for his award was wrongly premised. He had held that the earlier proceedings were auction proceedings which could not have involved difficult or novel points of law, when in fact, they were proceedings respecting the plaintiff's application for an order for sale.

[2] Although only two issues were finally decided upon by the court, the defendant was entitled to all the getting-up necessary for the preparation of its case and not merely in respect of those points relied upon by the court in arriving at a decision. The defendant had researched and submitted on numerous issues for which it was entitled to getting-up fees. The SAR had erred in failing to consider this.

[3] In assessing the sum for getting-up, the SAR had erred in disregarding the amount claimed by the plaintiff (approximately RM10m) on account that there was no proof of the actual value of the properties to be auctioned.

[4] Whilst it is inappropriate for a judge to interfere with a registrar's exercise of discretion on costs, yet the judge is duty bound to so interfere if that discretion has been exercised based on wrong principles or facts.

[Order of SAR set aside; getting-up fee increased to RM30,000]

Case(s) referred to:
Lloyds Bank plc v. Ang Cheng Ho Quarry & Ors [1993] 1 MLJ 127 ***(refd)***

Legislation referred to:
National Land Code 1965, ss. 241(1), 256, 257
Rules of the High Court 1980, O. 59 r. 36(1)

For the plaintiff - Shamira Karim Ally; M/s Soo Thien Ming & Nashrah
For the defendant - Shanti Thiruchelvasegaram; M/s Mahadevi Nadchatiram & Partners

Reported by Alex KC Lee

JUDGMENT

RK Nathan J:

The Application

This is an application by the defendant under O. 59 r 36(1) of the Rules of the High Court 1980 to review the decision of the learned Senior Assistant Registrar (SAR) against his own review made on 6 April 1998, when from his earlier award of RM10,000 for getting up, the learned SAR increased the amount to RM15,000.

On 5 January 1998 I dismissed with costs the plaintiff's application for an order for sale, pursuant to ss. 256 and 257 of the National Land Code 1965 (NLC), of 34 units of property which the defendant charged to the plaintiff as security for a loan granted by the plaintiff to the defendant.

This taxation arose out of that order.

Court's Findings

Dissatisfied with the increased award of RM15,000 the defendant has applied to me for a review of the learned SAR's award. My views on costs have been expressed in my article on *"Taxation of Costs"* reported in [1998] 1 MLJ xli. I said therein that:

> ... Save in an exceptional case or where some question of principle is involved, the judge will not interfere with the decision of the registrar on a question relating to fact or to the amount of costs and it is for the registrar to inquire whether the work was required to be done and he may disallow the whole costs of improper proceedings, but where he had not had reasonably sufficient material before him, or has taken into account matters which he should not have considered, or has not taken into account matters that he should have considered, or perhaps has given reasons that are incorrect, or where the matter is not purely one for his discretion, or where he has acted upon a wrong principle or adopted the wrong approach, the judge would order a review.

Applying this basic rule of thumb I find that in this case, I need to interfere with the award of the learned SAR.

Wrong Nomenclature Used

The learned SAR was of the view that the proceedings brought before me on 5 January 1998 was in fact auction proceedings. Having wrongly held that the proceedings were auction proceedings he therefore also wrongly concluded that auction proceedings are usually made in court and do not involve issues of law which are "difficult or noble"; he probably must have meant "difficult or novel". Since the justification of his award is based on a wrong premise this is a clear case for this court to intervene. What was before me was an application for sale. Only after the judge makes the order for sale is there an auction which is normally conducted by the Bailiff.

Not True That Only Two Issues Involved

The learned SAR found that there were only two issues decided by me. Whilst it is true that my written judgment is based only on two issues I did say in the final paragraph of my judgment that:

> In the circumstances, I find it unnecessary to consider the other issues raised by the defendant. The plaintiff's application is hereby dismissed with costs.

It is wrong for the learned SAR to have only considered the two issues identified by me in the judgment. He erred in failing to take account of the fact that the defendant had researched and submitted on all the other issues for which the defendant is entitled to getting up fees. As was said by his Lordship Chong Siew Fai J (as he then was) in *Lloyds Bank plc v. Ang Cheng Ho Quarry & Ors* [1993] 1 MLJ 127 an advocate and solicitor should not be precluded from preparing his client's case in greater depth to enhance chances of success.

In the circumstances, the defendant is entitled to all the getting up necessary for the preparation of the case and not just the issues relied on by the court in arriving at the decision.

Needless to say there were at least six - seven other issues raised by the defendant which I felt unnecessary to decide upon. There is no need for me to recount and narrate these other issues for the purposes of this review.

The Amount In Question

The learned SAR also failed to consider that the total sum claimed by the plaintiff was in the region of RM10 million. Whilst the number of properties involved were 34 in number the learned SAR reasoned that there was no proof shown as to the actual value of the properties involved. Clearly the amount at stake is around RM10 million. Whilst there is no evidence as to the actual value of each property, the call for auction of these properties would no doubt raise a substantial sum. It is wrong in principle therefore for the learned SAR to have discounted the amount of money involved from his consideration in evaluating the sum to be awarded for getting up, solely because there was no proof of the value of the properties to be auctioned.

That A Sum Of RM8.2 Million Was Loaned

The learned SAR's statement that a sum of RM8.2 million has been loaned to the defendant is wrong. There has been no such finding of fact by me in my written judgment. I did not at all go into the merits of the case. I dismissed the plaintiff's application due to non-compliance with s. 241(1) of the NLC. In fact the defendant has denied categorically that a sum of RM4.9 million has been released to the defendant. I do not know on what basis the learned SAR's written grounds state that a sum of RM8.2 million had been released to the defendant when this issue had not been decided by me and which issue in fact is the subject of a full trial before another court by way of Kuala Lumpur High Court Civil Suit No. D6-22-31-97.

The learned SAR's conclusion that it is not fair to burden the plaintiff with high costs because the plaintiff has suffered a loss of RM8.2 million is totally unacceptable and based on his own assumption. This alone ought to motivate this court to interfere.

Quantum

The defendant prays for a sum of RM100,000. To my mind a fair award in this case, taking into consideration the amount of work put in and the research required, would be RM30,000. Whilst each party has cited various cases where various awards have been made I must emphasise that each case must be considered on its own factual matrix peculiar to itself when considering an award for getting up.

As I said earlier, whilst it would be inappropriate for a judge to interfere with the exercise of discretion of the learned SAR in awarding costs, where such discretion is exercised based on wrong principles or facts, it is the bounden duty of a judge to interfere when called upon to do so. I therefore set aside the order of the learned SAR dated 6 April 1998 and instead award RM30,000 as fees for getting up with costs of this application to the defendant.